

subscribers per day. At this rate, PrimeTime 24 is likely to add one million or more net new subscribers during the next year, and a larger number of total new subscribers, if not enjoined.

F. PrimeTime 24's Awareness Of The Governing Legal Standard

PrimeTime 24 has publicly acknowledged that Section 119 of the Copyright Act imposes an objective test based on signal strength, and not a subjective standard based on picture quality. For example, in a mailing to subscribers on December 18, 1996, PrimeTime 24 stated:

Under the Satellite Home Viewer Act, 17 U.S.C. Section 119, PrimeTime 24 is not authorized to distribute satellite transmissions of network television stations to households that can receive a "Grade B intensity" signal from their local network station through the use of a conventional rooftop antenna. This is a technical standard used by the Federal Communications Commission as an indicator of adequate service. Unfortunately, this technical standard often does not reflect the quality of the picture that you are actually getting on your television set.

Def. Ex. 40 (emphasis added).

Similarly, last fall, in the context of efforts to persuade subscribers to write their legislative representatives, PrimeTime 24 stated:

Under the current law, your ability to view satellite network TV is based upon the intensity of the signal you receive from your local station, not based upon the quality of the picture on your TV set. . . . This needs to be changed. We believe Congress must change the law so that it focuses on the quality of your television picture.

Def. Ex. 24 (emphasis added).

G. PrimeTime 24's Marketing And Sales Practices

Based upon the evidence presented thus far, it would appear that PrimeTime 24's entire marketing and sales efforts are based on the premise that it will sell network programming to anyone who states that he or she does not receive an "acceptable" picture over the air, without regard to whether the customer receives a Grade B intensity signal. PrimeTime 24 makes no attempt to determine the strength of the network signals received by its subscribers:

Q: ... As part of your compliance program and activities, do you try to make a determination whether a subscriber who lives in a particular area is more likely than not to receive a signal of Grade B intensity?

A: No, we do not.

6/5/97 Tr. at 99 (Levi); see also 6/5/97 Tr. at 115.

Consistent with this policy, PrimeTime 24 does not limit its sales to satellite dish owners in remote rural areas, where households are less likely to be able to receive a Grade B signal of network stations. To the contrary, PrimeTime 24 sells its services in every community in the country -- including in urban and suburban areas where broadcast signals far exceed Grade B intensity:

Q. Is there any zip code in the United States to which PrimeTime 24 would decline to deliver network programming?

A. No.

Levi Dep. (Cannan Communications, Inc. v. PrimeTime 24 Joint Venture) at 153; see also 6/5/97 Tr. at 100 (Levi).

Instead of checking the location of its potential subscribers to determine if they are likely to be able to receive a signal of Grade B intensity, PrimeTime 24 relies exclusively on the answers of potential subscribers to three questions: (1) whether they intend to use the programming for residential use; (2) whether they have subscribed to cable in the previous 90 days; and (3) whether, in their opinion, they receive an acceptable picture over the air. 6/5/97 Tr. at 19 (Levi). PrimeTime 24 makes no effort to verify the accuracy of any of these answers prior to authorizing service. Levi Amarillo Dep. Tr. at 110. Moreover, before asking the third question, PrimeTime 24 suggests that its distributors tell potential subscribers that, if they say that they receive an acceptable quality picture, they will not be eligible to receive network service. 6/5/97 Tr. at 43 (Levi) & Def. Ex. 40.

PrimeTime 24 actively markets its services to households across the country. Its advertisements actively promote the benefits of receiving additional network services -- including access to more sports programming

and "time-shifting." Pl. Exs. 24, 25. Only in fine print at the bottom do the advertisements mention any limitations on eligibility. Even then, the disclaimer states, incorrectly, that viewers are eligible if they do not receive an "acceptable" picture.

The Court makes the above findings with the recognition that PrimeTime 24 does undertake some effort, however inadequate, to ensure SHVA compliance. Thus, each PrimeTime 24 contract with a distributor includes a requirement that the distributor sell PrimeTime 24 only to eligible households under SHVA, 6/4/97 Tr. at 111 (Amira), and requires the distributor to take reasonable steps to determine whether each subscriber ... qualifies as an 'unserved household'... before authorizing that subscriber to receive any of the stations retransmitted by PrimeTime 24" 6/4/97 Tr. At 175,184-187 (Shultz); Defs. Exhs. 24,26,27. In carrying out this provision the distributors are required to follow a script, provided to them by PrimeTime 24 to determine if a potential subscriber is eligible for PrimeTime 24 service. 6/4/97 Tr. At 175 (Schultz).<sup>8/</sup>

In addition PrimeTime 24 provides training to the customer service representatives employed by its distributors who are responsible for dealing

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<sup>8/</sup> As previously mentioned one major problem with the script is its improper focus on the viewers subjective characterization of picture quality.

with potential subscribers and determining their eligibility for PrimeTime 24 service as well as its own customer service representatives who handle the approximately 1 percent of its business. 6/4/97 Tr. at 175-177, 187-193. (Schultz). The training also includes periodic refresher training. Id. at 187-188. For the reasons hereinbefore stated the undersigned finds these efforts by PrimeTime 24 inadequate.

H.        PrimeTime 24's Sales To Households That Can Receive A  
Grade B Signal

The unrebutted evidence shows that PrimeTime 24 sells CBS and Fox services to large numbers of subscribers who can receive a signal of Grade B intensity from local stations affiliated with those networks. Maps from randomly selected television markets across the country show that PrimeTime 24 is making substantial unlawful sales in every market in the nation. Pl. Ex. 4. The maps show that a large number of these subscribers can receive a signal not just of Grade B intensity, but of at least Grade A intensity, which is even stronger than Grade B intensity. Id.; 6/3/97 Tr. at 304 (Cohen) (for channels 2-6, Grade A intensity is 10 times stronger than Grade B).<sup>9/</sup>

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<sup>9/</sup> PrimeTime 24 also provides service to households that have recently subscribed to cable television. For example, a sample taken in Tallahassee reveals that approximately  
(continued...)

Plaintiffs' maps were created using the "Longley-Rice" propagation methodology. This methodology was developed by U.S. government scientists, and it now exists in the form of a computer program that can be obtained from an agency of the U.S. Department of Commerce. 6/3/97, Tr. 253 (Cohen). The Longley-Rice methodology takes into account detailed data about the terrain that surrounds a particular television broadcast tower. Longley-Rice maps thus provide the best available information, short of conducting actual field measurements, about the likelihood that a specific household can receive a signal of a particular intensity from a particular television station. 6/3/97 Tr. 256 (Cohen); Hassinger Dep. Tr. 237.

The maps submitted by plaintiffs reflect two different levels of predicted signal intensity. In the area closer to the station's transmitter, the station is expected to deliver a signal of Grade A intensity or stronger. Farther away, the station is expected to deliver a signal of Grade B intensity or stronger, but not as strong as Grade A.

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<sup>9/</sup> (...continued)

one-third of PrimeTime 24 subscribers had subscribed to cable in the 90 days prior to subscribing to PrimeTime 24. Shatlock Decl. ¶¶ 2-4. In addition, an investigator retained by plaintiffs was able to sign up for PrimeTime 24 even after specifically telling the PrimeTime 24 representative that the household currently subscribed to cable. Kelly Decl. ¶ 11.

Plaintiffs' maps also reflect the locations of PrimeTime 24 subscribers. The locations of these subscribers have been pinpointed on the maps through use of a process called "geocoding." The geocoding process uses subscriber addresses, in combination with a database of information from the U.S. Census and the U.S. Post Office, to provide detailed longitude and latitude information for specific subscribers. These subscribers are represented by black dots on the map. The maps also contain reliable counts of the numbers of subscribers in the Longley-Rice Grade A and Grade B areas and in other defined areas.<sup>10/</sup>

Plaintiffs also arranged for actual signal intensity measurements to be taken near the locations of 100 randomly-chosen PrimeTime 24 subscribers in Dade and Broward Counties. The signal intensity tests were conducted using procedures set forth by the FCC in 47 C.F.R. § 73.686. The test results showed that all 100 of the subscribers could receive a signal of at least Grade B intensity from both the CBS and Fox stations in Miami. In fact, almost all 100 subscribers could receive a signal of Grade A intensity from both stations.<sup>11/</sup>

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<sup>10/</sup> To make this description clearer for the reader, black-and-white versions of two of these maps (for the CBS stations in Miami and Atlanta), are included as the next two pages of this opinion.

<sup>11/</sup> PrimeTime 24 argues that because South Florida is flat, one cannot generalize from  
(continued...)

PrimeTime 24 did not offer any evidence about the strength of the signals available to its customers; it prepared no maps; and it conducted no signal intensity measurements of its own at subscriber homes.<sup>12/</sup>

I. PrimeTime 24's Expert Witnesses

PrimeTime presented live testimony and a declaration from Russell Neuman, an expert in subjective evaluations of video and audio quality. PrimeTime 24 also presented a declaration, but no live testimony, from its lead expert, William Hassinger, a former FCC official.

Mr. Neuman's testimony discusses his views about the relationship between signal strength and subjective assessments of picture quality.

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<sup>11/</sup> (...continued)

the 100 signal intensity tests in Dade and Broward Counties. The Longley-Rice maps for more than 40 stations scattered across the United States, however, do take into account the detailed local terrain in each location -- whether flat, as in Miami, or mountainous, as in Colorado. The Court is therefore satisfied that the evidence submitted by plaintiffs properly reflects variations in local terrain.

PrimeTime 24 also argues that plaintiffs' initial maps are misleading because they depict only subscribers who receive PrimeTime 24 through DirecTV. The Court rejects that argument. First, the initial maps were limited to DirecTV data because PrimeTime 24 declined to produce broader data in discovery. Second, PrimeTime 24's CEO, Mr. Amira, testified that DirecTV is by far PrimeTime 24's largest distributor. Third, plaintiffs subsequently submitted five new maps, using data recently provided by PrimeTime 24 as part of the Section 119(a)(2)(C) reporting process, showing the locations of all of PrimeTime 24's subscribers from January and February 1997 for five different stations; the pattern reflected on the new maps is essentially identical to that on the maps showing only DirecTV subscribers.

<sup>12/</sup> Despite its statements in litigation that picture quality is "relevant" to the Grade B intensity standard, PrimeTime 24 has offered no non-hearsay evidence about the quality of the picture actually received by any of its subscribers.

Because the Court concludes, as discussed below, that Congress chose an objective signal strength test to determine eligibility under Section 119, Mr. Neuman's testimony is not relevant to any issue before the Court. In any event, Mr. Neuman's conclusions about the relationship between signal strength and picture quality are flawed; the only reliable data before the Court shows a strong relationship between signal strength and picture quality. See Supplemental Declaration of Jules Cohen (filed June 18, 1997).

Mr. Hassinger submitted a declaration discussing the "Grade B intensity" standard and arguing against use of signal intensity as the standard for eligibility to receive network stations by satellite. The Court does not find Mr. Hassinger's views helpful about the meaning of Section 119 as now in force, both because he lacks expertise in construing statutes and because he failed to consult any of the relevant legislative materials before drawing his conclusions. E.g., Hassinger Dep. Tr. 207, 227,

J. The Reporting System and Challenge Procedure.

Section 119 of the Copyright Act requires PrimeTime 24 to provide each network each month with a list of all new subscribers receiving programming of that network. 17 U.S.C. § 119(a)(2)(C). The 1994 amendments to Section 119 made clear that these lists must contain the subscriber's name and street address, including county and Zip Code. The

networks and their affiliates can then use the lists to "challenge" subscribers, either by sending letters to the carrier or by initiating litigation.

According to Plaintiffs, PrimeTime 24 routinely violates its statutory reporting requirements. First, Plaintiffs contend that PrimeTime 24 generally sends no new subscriber information to the networks until a month or more after the 15-day period specified in the Act. Davis Decl. ¶ 6 & Ex. C; 6/5/97 Tr. at 36 (Levi); compare 17 U.S.C. § 119(a)(2)(C).<sup>13/</sup> Second, it is alleged that PrimeTime 24 frequently provides only Post Office box addresses, rather than street addresses, which makes it impossible for stations to assess whether the dish owner lives in an unserved household. In addition, PrimeTime 24 almost never provides county information, Davis Decl. ¶¶ 7-8 & Ex. D; 6/5/97 Tr. at 121 (Levi), which would simplify the networks' task of dividing subscribers into local station market areas.

CBS network stations have sent letters to PrimeTime 24 challenging more than 425,000 PrimeTime 24 subscribers. Sullivan Decl. ¶ 4. Although the statute required PrimeTime 24 to complete the processing of

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<sup>13/</sup> In fact, until June 1997, PrimeTime 24 sent no information at all for more than 100,000 new subscribers signed up by its largest distributor, DirecTV, between August and November 1996. Davis Decl. ¶ 10 & Ex. E; 6/5/97 Tr. at 39-40 (Levi); Def. Ex. 48. For the same August-November period, PrimeTime 24 also appears to have reported no new subscribers for its other two Ku-band distributors (EchoStar and AlphaStar) or for a majority of its C-band distributors, including PrimeTime 24's own direct subscribers. Davis Decl. ¶ 10 & Ex. E; 6/5/97 Tr. at 128-29 (Levi).

such challenges during 1995 and 1996 within 60 days, see 17 U.S.C.

§ 119(a)(8)(A), PrimeTime 24 in fact has taken from 8 to 18 months to do so.

6/5/97 Tr. at 136 (Levi); Creasy Dep. at 68-69.

PrimeTime 24 counters by arguing that the degree of compliance now requested was never requested previously, that the incompleteness of some of the reports were the result of errors in computer processing and in some instances a direct consequence of Plaintiffs' failure to provide PrimeTime 24 with accurate and complete information. Even assuming the foregoing to be true, based upon the evidence herein submitted, this Court finds that Plaintiffs have done an inadequate job complying with the statutory reporting requirements.

PrimeTime 24 asserts that some network affiliates made "defective" challenges, and claims this made it more difficult for PrimeTime 24 to meet its obligations under the Act. 6/5/97 Tr. at 66 (Levi); Levi Decl. ¶¶ 18-19 To the extent that problems occurred, many appear to be traceable to defects in the subscriber information provided in the printouts sent by PrimeTime 24, such as sending the same names repeatedly as "new" customers, 6/5/97 Tr. at 124-25 (Levi); Pl. Ex. 35-36. Similarly, challenges to customers who no longer subscribed to PrimeTime 24 are inevitable given the long delays created by PrimeTime 24's insistence on sending subscriber lists in the form

of unusable printouts. In any event, PrimeTime 24's present practice is simply to return to affiliates any challenge it considers to be defective, Creasy Dep. at 75, with the result that PrimeTime 24 continues to provide network services to (and to obtain revenues each month from) the challenged subscribers.<sup>14/</sup>

PrimeTime 24 also claims its compliance efforts were adversely affected because network affiliates did not provide it with lists of Zip Codes within their FCC-predicted Grade A and Grade B contours -- predictions of signal coverage that are less accurate than Longley-Rice propagations -- until July 1996. Levi Decl. ¶ 21. As noted above, however, PrimeTime 24 and its distributors do not take likely signal strength into account in signing up new customers, and will sell network programming to dish owners in any Zip Code in the United States; they have not changed that practice since obtaining Zip Code information. See Pl. Ex. 33-34. The Court also notes that both Zip Code and station contour information are publicly available and equally accessible to PrimeTime 24. 6/2/97 Tr. at 165-68 (Schmidt); 6/3/97 Tr. at 267-68, 275 (Cohen); 6/5/97 Tr. at 106 (Levi).

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<sup>14/</sup> The evidence of "defective" challenge lists relied on by PrimeTime 24 all relates to late 1994 and early 1995, shortly after the 1994 amendments to the Act. See Levi Decl. ¶¶ 15-19 & Ex. F. The more recent challenge letters in the record clearly indicate which subscribers are being challenged and provide all the other information needed by PrimeTime 24. See Def. Ex. 39; Pl. Exs. 33-34.

## LEGAL ANALYSIS

On a motion for preliminary injunction, the Court considers four factors: (1) whether the movant has shown a substantial likelihood of success on the merits; (2) whether the movant will be irreparably injured unless the injunction issues; (3) whether the threatened harm to movant outweighs the damage that the injunction may cause the opponent; and (4) whether the injunction would be adverse to the public interest. Panama City Medical Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1545 (11th Cir. 1994); Duke v. Cleland, 954 F.2d 1526, 1529 (11th Cir. 1992); Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555, 1561-62 (11th Cir. 1989), aff'd., 498 U.S. 479 (1991); United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983); Bannum v. City of Fort Lauderdale, 657 F. Supp. 735, 737 (S.D. Fla. 1986).

"The first factor, substantial likelihood of success is most important in determining whether an injunction should issue in a copyright action." Georgia Television Co. v. TV News Clips, Inc., 718 F. Supp. 939, 945 (N.D. Ga. 1989); accord 3 David Nimmer & Melville B. Nimmer, Nimmer on Copyright, § 14.06[A], at 14-98 to 14-105 (1996) ("Nimmer") ("reasonable likelihood of success" is determinative factor). "If the plaintiff demonstrates a substantial likelihood of success on the merits in a copyright or trademark action, the plaintiff is entitled to a preliminary injunction." Original

Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 1040 (N.D. Ga. 1986).

Although in other contexts preliminary injunctions have been described as "extraordinary," they "are a common judicial response to the imminent infringement of an apparently valid copyright." Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979); see also Nimmer, § 14.06[A], at 14-113 ("in actual practice" preliminary injunctions in copyright cases are "quite ordinary, even commonplace").

A. Plaintiffs Have Established A Likelihood Of Success On The Merits.

To establish a substantial likelihood of success on the merits, plaintiffs must demonstrate a prima facie case of copyright infringement, i.e., (1) they own exclusive rights under the Copyright Act in the works at issue and (2) defendant has infringed those rights. Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801, 810 (11th Cir. 1985). "[A]ny violation of the exclusive rights of the copyright owner constitutes infringement." Savannah Forestry Equip., Inc. v. Savannah Equip. Inc., 25 U.S.P.Q.2d 1378, 1380 (S.D. Ga. 1992).

1. PrimeTime 24's Performance Of Plaintiffs' Copyrighted Works

The Copyright Act grants the owner of copyright in an audiovisual work such as a television program the exclusive right, among other things, to perform that copyrighted work publicly or to authorize a public display or performance of the work. 17 U.S.C. § 106.

There is no dispute that the numerous network programs at issue here are original audiovisual works fixed in a tangible medium of expression and thus are copyrightable subject matter within the meaning of the Copyright Act, 17 U.S.C. § 102. Plaintiffs CBS and Fox own copyright and/or exclusive rights in these network programs, Kryle Decl. ¶¶ 4-5 and Ex. A; Taylor Decl. ¶¶ 3-4 and Ex. A, and CBS has provided its affiliates with licenses to broadcast CBS network programming in their local markets, Kryle Decl. ¶ 4. Plaintiffs have submitted numerous Certificates of Copyright Registration issued by the U.S. Copyright Office for CBS and Fox network programs.

There is also no dispute that PrimeTime 24 has publicly performed the works at issue by transmitting these works to its many subscribers throughout the nation. Thus, unless PrimeTime 24 can establish that it is authorized to make these transmissions, plaintiffs have shown a substantial likelihood of success on the merits of their infringement claims.

## 2. The Limits Of The Section 119 Compulsory License

PrimeTime 24 asserts that it is authorized to make these transmissions by the compulsory license provided for in Section 119 of the Copyright Act and by the contractual license contained in its agreement with FoxNet. Both Section 119 and the FoxNet agreement, however, expressly limit PrimeTime 24 to "unserved households." Thus, if PrimeTime 24 has made transmissions of network service to households that are not "unserved," it has engaged in copyright infringement.

As the plain language of Section 119 makes clear, Congress adopted an objective test to determine whether a household is an "unserved household." According to this plain language, a household is not unserved if it can "receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the [FCC])" of a local network station affiliated with the relevant network. 17 U.S.C. § 119(d)(10)(A).

Despite the statute's plain language, PrimeTime 24 contends that it should continue to be able to offer network service to anyone willing to state

that his or her over-the-air picture quality is unacceptable. The Court cannot accept this contention.<sup>15/</sup>

When, as here, "the statute is clear on its face, [the Court] need not examine additional sources of guidance," Hudgins v. City of Alabama, 890 F.2d 396, 405 (11th Cir. 1989) (citation omitted). Thus, the Court holds that whether a household can "receive . . . an over-the-air signal of Grade B intensity (as defined by the [FCC])" is an objective test based on signal intensity levels defined by the FCC in its regulation setting forth Grade B intensity levels, 47 C.F.R. § 73.683(a).

In any event, were the Court to consider the legislative history, it would reach the same result.

Congress enacted the Section 119 compulsory license in 1988. The Committee Report prepared by the House Judiciary Committee, only a few weeks after it drafted the definition of "unserved household," contains the following explanation:

The term "unserved household" means a household that ... cannot receive, through use of a conventional outdoor antenna, a signal of Grade B intensity (as defined by the FCC, currently in 47 C.F.R. section 73.683(a)) ....

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<sup>15/</sup> As to the other prong of the definition of "unserved household" -- not having received cable within 90 days before subscribing -- PrimeTime 24 also relies exclusively on answers from subscribers, even though such answers are plainly unreliable. See note 8, supra.

1988 House Report, supra, pt. 1, at 26 (emphasis added). Section 73.683(a) is the regulation in which the FCC sets forth specific Grade A and Grade B signal strengths (e.g., 47 dBu for Grade B for channels 2-6). See note 2 supra.

Congress reaffirmed the point when it amended Section 119 in 1994.

The 1994 House Report states:

First, the household must not be able to receive, through the use of a conventional outdoor rooftop antenna, an over-the-air signal of Grade B intensity as defined by the FCC. This is an objective test, accomplished by actual measurement.

H.R. Rep. No. 103-703, at 13 (1994) (emphasis added). The Senate Report is to the same effect: "This objective test [Grade B intensity] can be accomplished by actual measurement." S. Rep. No. 103-407, at 9 n.4 (1994) (emphasis added).

That Congress did not intend a subjective standard is further confirmed by the fact that it considered and rejected a bill supported by PrimeTime 24 and other satellite carriers that included such a standard. That bill would have permitted viewers to receive network services by satellite if they submitted affidavits saying that they did not receive "adequate" service over the air.<sup>16/</sup> When Congress has expressly considered and rejected a proposal

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<sup>16/</sup> See Legislative Materials Relating to Enactment of the Satellite Home Viewer Act of (continued...)

to include particular provisions in a statute, "there could hardly be a clearer indication" that a law does not have the meaning it would have had if the proposal had been accepted. Tanner v. United States, 483 U.S. 107, 125 (1987); see Runyon v. McCrary, 427 U.S. 160, 174-75 (1976).

3. PrimeTime 24's Sales To "Served" Households

With this understanding of the statute, the Court now considers whether PrimeTime 24's subscribers are in fact "unserved." In so doing, the Court recognizes that Congress expressly placed on PrimeTime 24 the burden of proving that each of its customers is an "unserved household." 17 U.S.C. § 119(a)(5)(D). Although plaintiffs have the burden on this motion as to the four elements of a preliminary injunction, they can satisfy the first element by showing that PrimeTime 24 is unlikely to be able to prove at trial that its subscribers reside in unserved households.

PrimeTime 24 has not come close to meeting its burden. In particular, PrimeTime 24 has failed to submit any evidence showing that its subscribers who live within the predicted Grade A and Grade B Longley-Rice signal propagation areas of local CBS and Fox stations do not receive signals at the dBu levels specified by the FCC as "Grade B." Indeed, even if, contrary to

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<sup>16/</sup> (...continued)  
1988 (Exhibit C to Pl. Reply Brief).

this Court's holding, "over-the-air signal of grade B intensity" were a subjective test, PrimeTime has not submitted any credible, non-hearsay evidence about the quality of the reception that such subscribers are capable of obtaining over the air.<sup>17/</sup>

4. PrimeTime 24's Violations Are "Willful Or Repeated."

Section 119 makes a satellite carrier's delivery of network stations to unqualified households an infringement if it is either "willful" or "repeated." 17 U.S.C. § 119(a)(5)(A). Although plaintiffs need only establish that one of these tests is satisfied, PrimeTime 24's nationwide violations satisfy both.

PrimeTime 24's violations are "willful." To prove willfulness, it is necessary only to show that a person knew it was doing the acts in question, not that the person knew those acts were wrong. See, e.g., 47 U.S.C. § 312(f)(1) ("the term 'willful' ... means the conscious and deliberate commission or omission of [an] act, irrespective

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<sup>17/</sup> PrimeTime 24's lead expert, William Hassinger, testified at his deposition in detail about the steps PrimeTime 24 would need to take to provide the Court with valid data about the picture quality of its 2.5 million subscribers. As Mr. Hassinger explained, individual judgments about whether a particular television picture is "acceptable" are subjective (Hassinger Dep. Tr. 71-74, 80-81, 111), even when made by experts (Tr. 83). For that reason, the only way to develop valid data about whether a television picture is "acceptable" is to show it to multiple unbiased observers under controlled circumstances. Tr. 84-87, 94-95, 98-100, 105, 109-10, 114-15. Mr. Hassinger believes that at least five different observers are required (Tr. 85-86, 109-10), and acknowledges that many test protocols for evaluation of picture quality require even larger numbers. Tr. 105 (at least 15 observers); Tr. 100 (at least 20 observers). The observers must be unbiased -- unlike a dish owner, who has a stake in the outcome. Tr. 88-89, 90-91, 97-98, 116, 118-20, 123-26; see 6/3/97 Tr. 466 (Neuman).

of any intent to violate any ... rule").<sup>18/</sup> PrimeTime 24, which will sell to customers anywhere in the United States, is aware that it is serving hundreds of thousands of customers who are likely to receive a signal of Grade B intensity from local network stations. As PrimeTime 24's director of compliance testified, PrimeTime 24 "does not try to make a determination" about whether its subscribers are likely to receive a signal of Grade B intensity. 6/5/97 Tr. at 99 (Levi).

In any event, even if the "willful" standard required the Court to find "a degree of aggravated negligence" or some other form of scienter, that finding would be amply warranted by the record. PrimeTime 24 is delivering copyrighted CBS and Fox network programming to hundreds of thousands of subscribers for whom the evidence is overwhelming that they receive a signal of Grade B intensity. And although PrimeTime tried and failed to persuade Congress to adopt a test of eligibility based on subscriber statements about over-the-air reception, it ignores the Grade B standard that Congress did

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<sup>18/</sup> In PrimeTime 24 Joint Venture v. Telecable Nacional, 1990 WL 598572 (D.N.J. 1990), the court awarded \$2.96 million in damages to PrimeTime 24 for the defendant's unauthorized reception of PrimeTime 24. The court explained that "the term, 'willfully' [does] not requir[e] that the defendant know that he was acting wrongfully. It is enough that the defendant knew that 'he was doing the acts in question -- in short, that the acts were not accidental . . . .'" Id. at 2\* (citations omitted) (emphasis added).

adopt and operates its business as though Congress had adopted the subjective test it proposed.<sup>19/</sup>

PrimeTime 24's violations are also "repeated": PrimeTime 24 is unlawfully serving not merely a few ineligible customers, but thousands upon thousands of them, month after month. This plainly satisfies any reasonable understanding of the term "repeated."

5. PrimeTime 24's Defenses

a. "Prompt corrective action." PrimeTime 24 contends that plaintiffs are not entitled to relief if PrimeTime 24 took "corrective" action by promptly withdrawing service when notified that customers are ineligible. But the statutory provision to which PrimeTime 24 refers says only that "no damages shall be awarded for such act of infringement if the satellite carrier took corrective action by promptly withdrawing service from the ineligible subscriber." 17 U.S.C. § 119 (a)(5)(A)(I) (emphasis added). Because plaintiffs are seeking injunctive relief by the present motion, not damages, this provision is irrelevant.

b. "Unclean hands." PrimeTime 24 also advances an "unclean hands" defense, asserting that stations have inundated it with

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<sup>19/</sup> This finding disposes of PrimeTime 24's contention that it made "good faith efforts" to comply, which it apparently contends is relevant to whether its violations were willful or repeated.

challenges to subscriber eligibility while delaying in providing requested Zip Code information. To prevail on this equitable affirmative defense, PrimeTime 24 would have to prove that plaintiffs have acted fraudulently, deceitfully, unconscionably, or in bad faith. Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1383 (6th Cir. 1995). The unclean hands doctrine applies "only rarely" in copyright infringement actions. National Cable Television Ass'n v. Broadcast Music, Inc., 772 F. Supp. 614, 652 (D.D.C. 1991).

PrimeTime 24 has not carried its heavy burden here. To the contrary, the evidence (including, most notably, the maps described above) shows that it is PrimeTime 24 that has inundated stations with large numbers of ineligible subscribers in the stations' core service areas. When PrimeTime 24 submits voluminous lists of new subscribers -- almost all of whom are ineligible -- it can hardly complain when stations send back long lists of challenges or fail to give exhaustive attention to every subscriber.

In any event, PrimeTime 24's complaint about supposedly "defective" challenges is not supported by the record. Until a few months ago, PrimeTime 24 refused to provide subscriber lists to the networks in electronic form; instead, it sent each network boxes of thick, unwieldy computer printouts. Because PrimeTime 24's subscriber lists are unusable in that form,

the four networks had one of the network's lists typed in by hand, at considerable expense, so that the data could be separated out by computer into different markets. Although the lists sent to different networks vary slightly, PrimeTime 24 cannot blame broadcasters for taking reasonable steps to deal with PrimeTime 24's own failure to provide subscriber data in usable form. In fact, PrimeTime 24 benefitted from this system because ABC, CBS, and Fox stations were unable to challenge subscribers who received ABC, CBS, or Fox programming but did not appear on the NBC list. The reasonable response of the networks to PrimeTime 24's insistence on producing data in an unusable format does not show fraud, deceit, or bad faith, let alone provide a basis for PrimeTime 24 to violate plaintiffs' rights under the Copyright Act in the future.

The same is true of PrimeTime 24's other "unclean hands" arguments. Whether or not the challenges served by stations were uniformly perfect, PrimeTime 24 cannot expect perfection when its standard practice is to sign up large numbers of subscribers who receive a signal of Grade B intensity, to send its subscriber lists after the statutory deadline and in an unusable format, to list large numbers of subscribers with improper Post Office box addresses, and to fail for many months to send any lists at all for many of its distributors. Nor can the fact that PrimeTime 24 wanted stations to provide

Zip Code information (rather than acquiring the information on its own) justify PrimeTime 24's provision of network programming to "served" households, particularly since PrimeTime 24 has had the Zip Code information for almost a year and still sells programming to any Zip Code in the nation.

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For all of the foregoing reasons, the Court finds that the first factor -- likelihood of success on the merits -- weighs strongly in plaintiffs' favor.

B. Plaintiffs Will Suffer Irreparable Injury If An Injunction is Not Granted.

1. Irreparable injury is presumed when likelihood of success on the merits has been shown. When a plaintiff establishes a prima facie case of copyright infringement and no valid defenses apply, irreparable injury is presumed. Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1288-89 & n. 10 (10th Cir. 1996) ("we join the overwhelming majority of our sister circuits and recognize a presumption of injury at the preliminary injunction stage") (citing Concrete Mach. Co., Inc. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 611 (1st Cir. 1988); Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189, 192 (2d Cir. 1985); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983), cert. dismissed, 464 U.S. 1033 (1984); Service & Training, Inc. v. Data Gen. Corp., 963 F.2d 680, 690 (4th Cir. 1992); Forry, Inc. v. Neundorfer, Inc., 837 F.2d 259, 267 (6th Cir. 1988);